No. 14415

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY A. KUCKENBERG, HARRIET KUCKENBERG, and LAWRENCE KUCKENBERG, Doing Business As KUCKENBERG CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court
For the District of Oregon.

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of The United States District Court for the District of Oregon. It is in essence an action on a liability policy by the appellants-insured against the insurer to recover for loss suffered by the insured because of the insured's damaging the track and roadbed of the Southern Pacific Com-

pany. Appellate jurisdiction is granted to this Court by Title 28, Section 1291, U.S.C.A. The Court below assumed jurisdiction based upon diversity of citizenship and the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000.00.

STATEMENT OF CASE

The appellants were a partnership doing business as Kuckenberg Construction Company, and the plaintiff Henry Kuckenberg had been engaged in construction work since 1912 (Transcript 223).

On the 7th of May, 1947, the appellants entered into various contracts with The United States of America whereby they undertook to and did construct portions of a public highway known as the North Santiam Highway in Marion County, Oregon. One of the contracts being designated 24-A2 (Exhibit #1).

The appellants on April 1, 1947, contracted with and received from the appellee, Hartford Accident & Indemnity Company, a bodily injury property damage liability insurance policy No. LCX-2708 (Exhibit #2) effective April 1, 1947. This policy was cancelled by the appellee effective July 29, 1948.

The construction contract previously referred to required appellants to frequently work in close proximity to a railroad line of the Southern Pacific Company. During the process of the construction of the highway the track and property of the Southern Pacific Company were damaged and a substantial portion of the damage

was admittedly caused by appellants. This damage occurred during the period June 2, 1947 to July 29, 1948.

Inasmuch as appellants had labor and equipment available at the jobsite the Southern Pacific Company and appellants agreed that rather than the Southern Pacific Company do whatever repair work might become necessary on the track and make claim against appellants the appellants themselves would do the work, and this work was done during the period August 5, 1947 to July, 1949.

The appellee denied any and all liability to the appellants and refused to pay the appellants for any amounts expended by appellants in respect to repairs made to the railroad track and property.

The appellants then filed an action against the Hartford Accident & Indemnity Company and Southern Pacific Company seeking judgment for the costs of the repairs so made. The Southern Pacific Company answered and counterclaimed against the appellants in the sum of $8,762.16, the counterclaim being for the cost of repairs made by Southern Pacific Company and caused by damage to the track by the operations of the appellants. In the pre-trial order the Southern Pacific Company contended that the appellants' operations were negligently or intentionally conducted and that the damages sustained by Southern Pacific Company were occasioned solely and proximately by the conduct of appellants and that absolute liability is imposed on the appellants regardless of whether the damage resulted from the negligent or intentional conduct on the part of

appellants (pre-trial order contentions of Southern Pacific Company, 2, 2(a)).

The appellants tendered to appellee on December 1, 1949, the defense of the counterclaim brought by the Southern Pacific Company, and on December 7, 1949, the appellee refused to assume the defense to the counterclaim on behalf of the appellants.

Policy LCX 2708 (Exhibit #2) issued by the appellee to appellants contained an endorsement dated March 28, 1947, entitled "Property damage other than automobile" setting forth the obligation of the insurer to the appellants:

> "To pay on behalf of the insured those sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined in the policy for damages because of injuries to or destruction of property, including loss of use thereof, caused by accident, * * * "

That said policy LXC 2708 (Exhibit #2) paragraph II provided:

> "As respects such insurance as is afforded by the other terms of this policy, the company shall (a) defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent * * *."

In carrying out Contract No. 24-A2 the appellants were required in some instances to work over very rough terrain. Some of the terrain was actually located on the side of a canyon and the appellants in performing the contract did a certain amount of blasting.

Under the contract the appellants were required to clear and excavate and to construct new roadbed (Transcript 66).

Points on the ground on which the construction was being performed were located and designated by stations and these stations were 100 feet apart (Transcript 67). The new highway built by the appellants was above the railroad tracks varying in distance from 20 feet to 600 feet (Transcript 69—Findings Par. 13).

The terrain in the vicinity of the tracks varied in composition from gravel and dirt to hard rock, and the tracks and the property of the Southern Pacific were damaged at the stations indicated on appellants' Exhibit No. 28 (Transcript 71) and it was for those damages that action was commenced.

In all fairness to the appellee it is not the contention of the appellants that the appellee is responsible for the following items in Exhibit 28:

August 27, 1947, Station 620

October 7, 1947, Sardine Creek Trail derailment

January 7, 8, 9 and 10, 1948, Mayflower Creek washout

April 9, 1948, Station 699, road fell on track,

as these particular items of damage were not established as being due to the appellants operations and the facts relating to them were uncertain.

It is the appellants' contention that the damages occuring at the stations shown on Exhibit 28 with the exceptions above noted are covered by policy LCX 2708

(Exhibit #2) and that such damages were "caused by accident" as that term is used in the policy.

It is also the contention of the appellants that by the terms of the policy LCX 2708 (Exhibit #2) the Hartford Accident & Indemnity Company was required to defend appellants against the counterclaim asserted by Southern Pacific Company.

SPECIFICATION OF ERRORS

Appellants contend that the Trial Court erred in the following particulars:

1. In finding and concluding that the injury and damage to the property of the Southern Pacific Company was the reasonably anticipated, ordinary and expected result of appellants' operations under the circumstances and did not result from "accident" (Findings of Fact, Par. 13, Conclusions of Law, Par. 1).

2. In concluding that the appellee was not required under the relevant policy of insurance to appear and defend on behalf of the appellants against actions or claims brought against the appellants by the Southern Pacific Company for damages resulting from appellants' road building operations (Conclusions of Law, Par. 3).

ARGUMENT

Summary of Argument

As indicated in the Statement of Case and Specification of Errors, the appellants contend that the testimony

of the witnesses showed that the damages incurred at the stations listed on Exhibit 28 were accidental and covered by the policy LCX 2708. Appellants further contend that the allegations of the counterclaim of the Southern Pacific Company in both the pleadings and the pre-trial order (Pre-Trial Order Contentions of Southern Pacific Par. 2, 2a), were such that the appellee was obligated to defend the appellants against the counterclaim of the Southern Pacific Company under the provisions of Policy LCX 2708.

FIRST SPECIFICATION OF ERROR

The Trial Court erred in finding and concluding that the injury to the property of the Southern Pacific Company was the reasonably anticipated, ordinary and expected result of appellants' operations under the circumstances and did not result from accident (Findings of Fact, Par. 13, Conclusions of Law, Par. 1), for the reason that the evidence clearly indicates the damages were "caused by accident" as that term is used in the policy of insurance.

Argument, Point I

The injury and damage to the property of the Southern Pacific Company were fortuitous, unforeseen, untoward and unexpected and resulted from accident. The nature of the various accidents which caused damage to the track is shown in Exhibit #28.

The Trial Court received Exhibit #28 (Transcript 79) and permitted appellants, largely through witness Hilding F. Lind, to present detailed evidence of one or more accidents as illustrative of appellants' contention that the damages were "caused by accident".

> "The Court: I suggested to Mr. Denecke that in view of the fact that this is not a hearing on damages, that he only talk about such additional occurrences as are illustrative of his four types of claims, and if he has sufficient now to illustrate each of the four types, that he confine his other interrogation to the claims against the Southern Pacific. Go ahead.
>
> Mr. Denecke: Well, your Honor, I believe I have covered the various classifications as far as claims against the Hartford are concerned." (Transcript 100)

The accidents which resulted in damage to the Southern Pacific Company's track and property can be classified into three categories, as follows:

1. Those where appellants anticipated that rock would do damage to the tracks and roadbed and in order to prevent the damage the tracks were blanketed with protective materials, but through unforeseen circumstances the protective measures failed and damage was done.

2. Those where appellants had worked in an area and nothing had fallen on the track and then because of some combination of circumstances the appellants' work caused some object or objects to fall on the track doing damage.

3. Those where appellants anticipated that most of the rock being moved would not reach the track or roadbed and that if it did little damage would ensue. However, due to some unforeseen happening the small rocks would dislodge larger rocks which on some occasions would fall and hit the track or roadbed.

Illustrative of an accident falling within the first category was the testimony of Mr. Hilding F. Lind, the superintendent of appellants, and Exhibits 25A and 25B (Transcript 84-85-86):

"Mr. Gearin: Which station is this you refer to?
The Witness: 714.
Mr. Denecke: 714, August 24th.
Mr. Gearin: 714.
The Witness: I have two pictures of this one before, and here is one that is after. The first picture shows the——
Mr. Denecke: 25-A?
Mr. Powers: 25-B.
The Witness: The cut that is showed to our bottom and to our right, we can see the railroad track of the Southern Pacific line, and we can see these here are the rails. We can see that there were three or four feet of dirt has been hauled in and placed on top of the railroad track.

Now, we drilled this rock with lifters from down below, and at the spots shown here and ending off up here (indicating), this cut was supposed to have been cut out like that when it was shot, and then the slab was to have been taken out, and under this program we had figured that there would not be enough weight on this with that covering the entire railroad so that the rock would fall on the track and do any excessive damage.

Q. (By Mr. Denecke): Mr. Lind, see if you can mark on that with a pen there how much that you took out.

A. I think it would come out about like that (drawing on photograph). This, in fact, is finished road down here, so your deal would be down like that about 20 feet. Well, as you can see here, this tree is this same tree after the shot. This is the top of it right here, and the top of this tree that you see here is this tree sitting over here. This broke back. According to the Bureau of Engineers, we took

out about 12,000 more yards, more material in back out of this than was originally designed to come out, yet, at no time,—our shots were all examined by the government—we did not shoot any dynamite shots beyond the toe of our slope. This all up here came out of its own free will. You can see these enormous boulders here.

There is a man on them. That thing is probably almost 75 to 100 feet square and 30 to 40 feet deep. That in itself came from clear up here in the mountain.

The Court: How far away from the place where you did the shooting?

The Witness: Well, it is above the shooting. We took the bottom out. We were attempting to take the bottom out, and then, as you can see, all of this rock up here came down. The two pictures are taken pretty much from the same angle. There are big boulders laying up in here.

The Court: You did not intend that the boulders would come down at all?

The Witness: Neither did the government engineers. This is staked only to come to here (indicating), and this slab to come off, but when there is a fault in here—the picture of that fault was taken previous to the shooting, not that we knew that it was going to bust that far, but we took the picture of that fault so we could show the Army Engineers. This is the rock in question here, and there is that small seam that ran under here. Now, we are asked to take it down like that (indicating). That is the way it was staked, but when we shook this a little bit, this whole mass came down. It was not anticipated, no."

As illustrative of the second category, and referring in particular to Station 668, Mr. Lind testified (Transcript 98):

"This damage was caused by a falling snag. This snag fell as a result of falling another tree next to

it. In other words, when we fall, do clearing and falling timber, if you fall a tree, if one tree happens to hit another one, a snag, why, the snag may fall, probably will.

The Court: Did that?

The Witness: That in turn went down on the railroad track.

The Court: And damaged the railroad track?

The Witness: And damaged the railroad track. As they go endo, they will go down, hit the rail, tear out a place, is what happened. * * *"

Again referring to Station 708 October 2nd, Mr. Lind testified (Transcript 97-98):

"The Witness: October 2, 708, this was caused by rock falling off the shovel and falling on the track. When we say rolling off the shovel, we mean that we pick up a rock, and you swing around to load it in the truck, and if it rolls off the teeth, and when we say rolling off the shovel, we mean it rolls off the bucket, and it is liable to fall into the truck, and it happens quite often he busts the truck, and it is just like—most of these big rocks were balanced on the end of your teeth as you load it, and if they fall off the shovel bucket, why, they do damage."

As illustrative of the third category, Exhibit No. 28, referring to Station 694, indicates:

"At this particular point, the old and the new road were on the same level. There was loose rock from the construction of the old road in this location, and very small shots on the new road construction caused some of this loose rock to go over the edge and fall on the track. Some of this loose rock carried larger boulders down with it. Although it was expected that some rock would fall on the track at this point, the track was not blanketed as it was not expected that any boulders of sufficient size to hurt the track would be carried down on it."

There has been considerable litigation in the past few years involving the meaning of the words "caused by accident" as used in an insurance policy. In 7 Appleman Insurance Law and Practice, Section 4492, the author states:

> "When used without restriction or qualification in an insurance contract, the term accident has been held broader than the strict definition of an event happening suddenly and violently. Where there is no direct evidence as to the cause of the injury, it is regarded as accidental. The mere violation by a workman of some instruction as to place of work would not change a resulting accident to an intentional act. Injuries resulting from ordinary negligence are considered to have been accidental, as has been the case even though gross negligence was shown where there was no actual intent to injure. Use of coarse language which causes fight and resulting injury is not considered to be wilful in its nature.
>
> "The state of will of the person by whose agency injury is caused has been held determinative of whether or not the injury was accidental within the meaning of a policy of liability insurance. This rule has not been unanimously accepted, however, it is being considered elsewhere that the injury shall be considered from the point of view of the victim, and if it was accidental from his point of view, the loss is covered. When such acts are construed from the viewpoint of the actor, if they show only negligence and not wilful intent to inflict injury, the insurer is liable."

In *Springfield T. P. et al. v. Indemnity Ins. Co. of America* (1949 Pa.), 64 Atl. (2d) 761, the action was in assumpsit by the plaintiff against the defendant on a contractor's liability policy to recover costs and counsel

fees expended in the defense of five proceedings for property damage claims resulting from blasting in construction of a sewer. There was a judgment for the plaintiffs and the defendant appealed.

In affirming the lower Court, the Supreme Court of Pennsylvania stated:

> "Defendant conceded that the terms of the policy required it to defend trespass actions, alleging negligence which the abutting property owners initially instituted and later discontinued but contended that it was not required to defend the five proceedings for the same damages, on the ground that the damages 'accidentally suffered' are not recoverable in such proceedings, recovery being limited by law to damages which are the necessary and unavoidable consequences of the nonnegligent exercise of the right of eminent domain.
>
> "With this contention we cannot agree. It assumes, erroneonsly, that the terms 'negligence' and 'accident' are synonymous. Such, however, is not the case. * * * 'Accident', and its synonyms, 'casaulty' and 'misfortune' may proceed or result from negligence, or other cause known, or unknown."

The Court continued:

> "Petitions in the five proceedings alleged that Appelees 'caused large charges of dynamite and/or other material to be exploded for the purpose of removing rock as the work progressed; that as a result of the blasting operations large quantities of dirt and rocks were thrown' on petitioners' properties and 'that concussions and vibrations caused by the aforesaid blasting in the construction of said sewer caused great damage' to petitioners' buildings.
> "As pointed out by the Court below 'There is nothing in any of the petitions to indicate that the injury complained of was foreseen or expected, or designed or intended. Prima facie, the injury was "*an unusual*

> *effect of a known cause",* and, hence, "accidentally suffered".'
>
> "Moreover, the appellant recognized that the terms of the policy were broad enough to include damages to abutting premises as a result of blasting, by eliminating from 'Exclusions' structural injury to any building or structure adjacent to the insured premises due to * * * excavations below the natural surface of the ground or due to blasting therein or thereon." (Italics supplied)

The Court stated that the insurers ultimate liability to pay damages was not before it, but it nevertheless adopted the following definition of "accident":

> "An accident is an occurrence which proceeds from unknown cause, or which is an unusual effect of a known cause, and hence unexpected and unforeseen."

In *Larsen v. General Casualty Company of Wisconsin* (Minn.), 99 Fed. Supp. 300, the plaintiff had purchased from the defendant a manufacturers and contractors liability policy. The plaintiff was in the business of servicing and repairing oil burners. An employee of the plaintiff working at a customer's home negligently reassembled the connection between the furnace door and the oil burner and oil leaked out and a fire ensued.

The property owner's fire insurance carrier paid for the damage and then as subrogee sued the plaintiff. Defense of the case was tendered to the defendant and refused. A judgment was obtained by the Home Insurance Company, the subrogee, against the plaintiff, and then plaintiff sued its insurer to recover the amount of the judgment plus costs and attorneys' fees.

The policy in question contained a similar clause to that in policy LCX 2708 (Exhibit #2) and it was the contention of the defendant that there was no "accident" and therefore no coverage under the policy.

The Court held in affirming judgment for the plaintiff:

> "There is no limitation or restriction in the policy with reference to the use of the word 'accident'. Consequently, there is no occasion to employ the narrow or restricted interpretation or understanding of that term. * * * The fire was an occurrence or mishap unintentionally caused and commenced within the plain intendment of the policy as the term 'accident" broad and unrestricted is used therein."

Generally the Courts have been called upon to determine the meaning of the phrase "caused by accident" in those cases where personal injury has been suffered as a result of an assault and battery. By the great weight of authority injuries resulting from assault and battery are "accidental" within the provisions of a liability policy.

New Amsterdam Casualty Company v. Jones (Mich.), 135 F. (2d) 191.

Huntington Cab Co. v. American Fidelity & Casualty Co. (W. Va.), 155 F. (2d) 117.

Maryland Casualty Company v. Baker (Ky.), 200 S.W. (2d) 757.

Archer Ballroom Co. of Nebraska v. Great Lakes Casualty Co. (Wis.), 295 N.W. 702.

Cordon v. Indemnity Insurance Co. of America (Ohio), 123 F. (2d) 363.

Rothman v. Metropolitan Casualty Co., 16 N.E. (2d) 417, 117 A.L.R. 1169, 1175.

Mr. Stuart Leavy, the agent for the Hartford Accident & Indemnity Company who wrote the policy in question for the appellants stated (Transcript 255):

> "On the property damage, that is damage to property of others which occurs through accidental injury. It must be something unexpected, not anticipated at the time the event occurs which caused this unexpected or accidental injury."

Again Mr. Leavy in answering the Court's question as to the frequency of a particular happening testified (Transcript 259):

> "If it was beyond their expectations or that which the contractor ordinarily would expect. We have those cases come up quite frequently in connection with blasting, and our contractor puts a blast in where he thinks it is going to react within a certain area, and it goes beyond that, and it shakes down plaster and homes and so forth, and then we have property damage claims which we pay."

The law in this particular field is summarized in a paper presented before the Society of Chartered Property & Casualty Underwriters on June 29, 1949 and written by Bernard MacManus, Jr. and Robert Williams to be as follows:

> "Supported by the Case Law and Statutes examined, sheer logic glaringly points from these premises to the conclusion that *if the damages were not wilfully intended or wilfully inflicted, then the damages must have been fortuitous, unforeseen, untoward and unexpected; i.e. they were caused by accident.*
>
> "As no liability policy may cover damages wilfully inflicted or wilfully intended, the only possible conclusion to be drawn is that a liability policy on a 'caused by accident' basis is no less inclusive as to

coverage than one on the 'occurrence' basis. In this one respect, one policy form will do no more, insurance wise, than the other, and there is accordingly no distinction between them." (Italics supplied)

The authors discussed "operational damages" and give as an example the situation where a licensed hauler's heavy equipment regularly and frequently moves over sidewalks. In such instances the sidewalks give away on occasions and the authors state:

"Particularly as respect claims of this caliber there seems to be considerable disagreement as to whether such a casualty was so unexpected and fortuitous as to bring it within the scope of liability insured damages 'caused by accident'. In every such situation, however, there enters the matter of judgment, particularly the judgment of the operator of the vehicle, or the one in charge or responsible. *Such a judgment may be negligently formed, may be thoughtless, careless, or even irresponsible. But in the absence of admitted knowledge of expected results and of expected damages, of a nature sufficient to justify the imposition of liability, based on intent to inflict, the claim is one of damages 'caused by accident'.*" (Italics supplied)

The authors state that such claims are within the policy coverage unless there is proof of an act of wilful damage and that

"In the absence of such proof operation damages are within the scope of coverage of liability policies whether written on a 'caused by accident' or 'occurrence' basis, * * *."

Although there has been considerable litigation relative to personal injury on the phrase "caused by accident" there have been few cases involving property damage claims.

The case of *Cross et al. v. Zurich General Accident & Liability Insurance Co.* (C.C.A. 7th), 184 F. (2d) 609, decided October 19, 1950, was a property damage case and involved a factual situation almost identical to some of the instances when damages were sustained to the track and property of the Southern Pacific. In that case the Public Liability Policy provided:

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury * * * property * * * *caused by accidents* which occur during the policy period * * *." (Italics supplied)

The plaintiffs were engaged in the business of cleaning the exterior of buildings. Their usual method of cleaning the buildings was not too successful and so they obtained permission from the managers of the buildings to use a solution compounded of one cup of hydrofluoric acid to five gallon bucket of muretic acid solution. After the solution had been applied it was then washed off the masonry with a jet of wet steam. The plaintiffs knew that the hydrofluoric acid had the property of marking or etching glass, and therefore to avoid acid damage to the windows adjoining the area being cleaned they adopted the following protective procedure. Before and during the application of the solution to the walls, and while the solution was being washed off a jet of steam water or wet steam was played upon the windows. Nevertheless, some of the glass in the windows of the building was damaged by the solution which had been used and claims for damages were received by the

plaintiffs from some of the tenants and from the agents of the building.

The insurance company denied the claims, stating that the damage was not occasioned by an accident and then the plaintiffs brought suit against the insurance carrier for a declaratory judgment. The District Court held that the damage to the windows which gave rise to the claims against the plaintiff was not "caused by accident".

In sustaining the contention of the plaintiffs, on appeal, that damages were "caused by accident" the Appellate Court stated:

> "The basis for the decision of the trial court was that plaintiffs intentionally used hydrofluoric acid in the solution and failed to take precautions of covering the windows with grease or heavy paper. But failure to make a proper or effective precaution does not prove intent to damage. Plaintiffs may have been negligent in not keeping sufficient water on the windows, but the very fact that the water was applied to each window negatives any idea that plaintiffs intended to damage same. *And lacking such intent the damage was accidental, even though caused by negligence.* The insured bought and paid for protection against liability for negligent acts. *A policy such as here under consideration covers the risks incidental to the occupation in which the insured is engaged.* It is well settled that negligence on the part of the insured which causes or contributes to the injury or damages is not a defense." (Italics supplied)

The testimony of Mr. Lind supplemented by Exhibit 28 shows that on a number of occasions the appellants were aware that blasting would cause rocks to be thrown on to the track and in order to obviate and cut down

any possible damage to the track or roadbed the appellants blanketed it with approximately four feet of earth. In the *Cross* case supra, the plaintiffs knew that the solution used would mar and scratch the windows but preventative measures were taken and although they proved to be unsuccessful nevertheless the damage incurred was "caused by accident". Although it may be urged that the appellants did not blanket the tracks with sufficient earth, "the very fact that the tracks were blanketed negatives any idea that the appellants intended to damage same." And lacking such intent the damage was accidental even though caused possibly by negligence.

In *Koch v. Ocean Accident and Guarantee Corp. Ltd.,* 313 Ky. 220, 230 S.W. (2d) 893, the plaintiff, a general contractor, had contracted to repair a church building which had been damaged by fire. In making the repairs the employees of the plaintiff joined a floor joist to a wooden header which replaced a wooden header that had been destroyed by the fire. The employees of the plaintiff installed the new header so that it was placed in contact with the breast of the chimney of the church and later when a fire was built in the furnace it ignited the wooden header causing a second fire which damaged the church. It was the contention of the plaintiff that the second fire which damaged the church was an accident within the meaning of the policy which provided "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed up him by law for damages because of injury to or destruction of property, including the

loss and use thereof, *caused by accident* and arising out of the hazards hereinafter defined." (Italics supplied.) The insurance company contended it was not an accident within the meaning of the policy and that the policy was not one to indemnity the insured against loss arising out of the incompetency of his employees in designing or making repairs to the property which created a fire hazard and that it was not a policy to indemnity the insured against loss arising out of a claim based upon defective workmanship, design or materials. The Court of Appeals in reversing judgment in favor of the insurer held:

> "The most that can be said in favor of the contention of the insurer is that the language of the policy is susceptible of two interpretations, one of which would result in its liability, the other in its exemption from liability."

The Court then stated that where the language in an insurance contract is ambiguous or that there is doubt of uncertainty as to its meaning the one favorable to the insured and the other favorable to the insurer the former will be adopted.

Surely it cannot be contended that where a large boulder slips out from the claws of a shovel and falls on the railroad track that an accident did not occur. In such an instance it is the obvious intention of the appellants to lift the boulder into a truck and the fact that it falls and hits the railroad track is certainly unexpected and unintentional and unforeseen. It was an accident in the truest sense of the word. The same can be said on those occasions when snags fell on to the railroad

track because of being dislodged by springing or drilling or equipment movement in the immediate area or due to the fact that another snag was felled which struck another causing it to fall on to the railroad track. In those cases where ravelling occurred it certainly was unanticipated as far as appellants were concerned and when the operations of the appellants caused this "ravel" surely it cannot be contended that it was anything but unexpected, unforeseen and unanticipated.

It is submitted that in all instances where the track or roadbed of the Southern Pacific Company sustained damage an accident occurred both from the viewpoint of the appellants and the Southern Pacific Company in that an *undesigned unforeseen and unexpected mishap* occurred resulting in injury to a person or damage to a thing. There is nothing in the evidence to indicate that the damages were wilfully intended or wilfully inflicted, in fact the contrary appears from all the evidence, and thus the damages must have been fortuitous, unforeseen, untoward and unexpected, i.e. they were caused by accident.

It is said that "accidents will happen" and the fact that they may occur in some instances more than others does not make them any the less accidents.

Over a period of about two years accidents occurred as a result of the appellants' operations under contract 24-A2 (Exhibit #1) and though these accidents may, to some extent, be factually similar, they were nevertheless separate, distinct incidents, each constituting a separate accident within the terms of the policy.

SECOND SPECIFICATION OF ERROR

The trial court erred in concluding that the appellee was not required under the relevant policy of insurance to appear and defend on behalf of the appellants against actions or claims brought against the appellant by the Southern Pacific Company for damages resulting from appellants' roadbuilding operations for the reason that the counterclaim of the Southern Pacific Company as asserted against the appellants was clearly within the policy coverage.

Argument, Point I

Paragraphs 2 and 2(a) of the Contentions of the Southern Pacific Company as set out in the pre-trial order read (Transcript 32 and 33):

> "Plaintiffs' *operation were negligently or intentionally conducted* and the damages sustained by Southern Pacific Company were occasioned solely and proximately by the aforesaid conduct on the part of the plaintiffs.
>
> "(a) As a corollary to contention No. 2 it is the position of Defendant Southern Pacific Company that by reason of blasting by the plaintiffs, *absolute liability is imposed regardless of whether the damages resulted from the negligent or intentional conduct on the part of the plaintiffs.*" (Italics supplied)

Policy LCX 2708 (Exhibit #2) provides in part:

> "As respects such insurance as is afforded by the other terms of this policy, the company shall (a) *defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof,*

even if such suit is groundless, false or fraudulent. * * *." (Italics supplied)

Generally the liability of an insured to defend an action and pay the resulting judgment is measured by the allegations of the complaint.

As to the duty of the insurer to defend, the comment at 8 Appleman Insurance Law and Practice at Section 4683 is generally recognized to state the weight of authority:

> "*An insurer's duty to defend an action against the insured is measured by the allegations in plaintiff's pleading* * * * or, as some courts have expressed it, the language of the policy and the allegations of the complaint must be construed to determine the insurer's obligations * * *.
>
> "The nature of the claim against the insured rather than the details of the accident determine whether the insurer is required to defend. And it has been held that the insurer's obligations is to be determined when the action is brought and not by the outcome of the action * * *.
>
> "On the other hand, an insurer cannot be called upon to defend a suit against the insured, where the petition or complaint upon its face alleges a state of facts excluded from the policy." (Italics supplied)

This Court recently had occasion to rule on the obligation of the insurer to defend in the case of *Journal Publishing Co. v. General Casualty Company* (C.C.A. 9th), 210 F. (2d) 202, decided January 15, 1954. In that case an original action had been filed by Perton in the State Court against the Journal Publishing Company in which he alleged that at the time of his injury he was in the employment of The Journal. The General Casualty

Company refused to defend the action on the ground that the facts alleged in the complaint showed no coverage under its policy. The Journal Publishing Company eventually settled the action brought against it by Perton and then commenced action against General Casualty Company to recover for the amount paid to Perton and for its defense costs and expenses.

This Court reviewed many cases upholding the obligation of the insurer to defend and concluded:

> "We hold therefore that even *although it may be considered that the pertinent complaint stated a case necessarily outside of the policy coverage, and that in consequence when this complaint was handed to General it owed no duty to defend,* yet we think that a policy of this kind will not stand a construction which would permit General to escape its obligation under paragraph 1 merely because of an allegation of employment made by a third party claimant for whose acts and allegations the insured can hardly be held responsible. The contract drawn and sold by it ought not thus to be construed so strongly in its own favor. One of the outstanding facts of modern litigation is the diminishing importance of initial pleadings in the light of the ease of amendment and the use of pre-trial proceedings to lay the pleadings on the shelf. This plasticity of modern pleading was alluded to in Lee v. Aetna Casualty Insurance Co. (C.C.A. 2d) 178 F. 2d 750, where the Court seems to suggest that if an initial pleading were later amended to disclose for the first time a case within the policy, the insurer might then have to take over the defense. We are not confronted with that situation here, but we think that the considerations there mentioned are additional reasons why the Court below was in error in assuming that the question of liability not only under paragraph 2 but under paragraph 1 as well, can be

CONCLUSION

The appellants respectfully submit that the Findings of Fact and Conclusions of Law of the Trial Court are clearly erroneous and that the damages sustained on the tracks and roadbed of the Southern Pacific Company resulted from the construction operations of the appellants and were "caused by accident" as that term is used in the policy; that the appellee was obligated to defend the appellants against the counterclaim asserted by the Southern Pacific Company as the counterclaim as alleged in the contentions of the Southern Pacific Company in the pre-trial order was clearly within the policy coverage irrespective of whether or not it was later determined that the damages so asserted by the Southern Pacific Company in the counterclaim were not caused by accident.

Respectfully submitted,

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